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Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

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AKOS SWIERKIEWICZ,

*Petitioner,*

*versus*

SOREMA N.A.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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28 pp

## QUESTION PRESENTED

Must an employment discrimination plaintiff do more in his complaint than put his employer on notice of his discrimination claims, i.e., must he also plead specific facts showing that at trial he can make out a *prima facie* case of discrimination under *McDonnell Douglas v. Green*?

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Akos Swierkiewicz respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the order of the United States District Court for the Southern District of New York dismissing his amended complaint for failure to state a claim upon which relief can be granted.

## OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is reproduced in the Appendix at App. 1a - 4a. The opinion of the District Court is also unreported. It is reproduced in the Appendix at App. 5a - 9a.

## JURISDICTION

The Court of Appeals entered its judgment on March 13, 2001. App. at 1a. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

## FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides in relevant part: "A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move for the dismissal of a pleading for "failure to state a claim upon which relief can be granted."

## STATEMENT OF THE CASE

Fired from his job, petitioner, Akos Swierkiewicz, sued his former employer, respondent, Sorema N.A. ("Sorema"), on claims of national origin and age discrimination. His national origin claim was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*("Title VII"); his age discrimination claim was based on the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA").

### A. Course of Proceedings Below

The complaint was originally filed in the United States District Court for the Eastern District of Pennsylvania where Mr. Swierkiewicz resided. On Sorema's motion, the action was transferred to the United States District Court for the Southern District of New York where Sorema is headquartered.

After the action was transferred, Mr. Swierkiewicz amended his complaint as of course to challenge his dismissal on parallel grounds of national origin and age discrimination based on Sorema's violations of New York State and City law. Jurisdiction over these supplemental claims was conferred on the district court by 28 U.S.C. § 1367(a). Sorema then moved to dismiss the amended complaint on the ground that it "failed to state a *prima facie*



case of discrimination based on national origin or age." In support of its motion, Sorema submitted an affidavit from its trial counsel that contained uncorroborated hearsay allegations that went well beyond the four corners of the amended complaint. Mr. Swierkiewicz opposed the motion and objected to the improper allegations in defense counsel's affidavit.[1]

After hearing oral argument, the district court granted Sorema's motion and dismissed the amended complaint with prejudice. App. at 5a - 10a.[2] Analyzing the

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[1]The affidavit essentially rewrote the amended complaint so that it could be read in the light most favorable to Sorema. For example, while the amended complaint alleged that Mr. Swierkiewicz was demoted in 1995 on account of his national origin and age, *id.* at ¶ 20, the affidavit asserted there was no demotion, but rather, "a reorganization occurred at Sorema which resulted in changes in Swierkiewicz's job responsibilities." Aff. at ¶ 3 (emphasis added). Moreover, while the amended complaint alleged that after two years of discrimination following his demotion, Mr. Swierkiewicz sent a memo to Sorema's CEO outlining his grievances and requesting a severance package to resolve them, *id.* at ¶ 31, defense counsel's affidavit asserted that he wrote the memo because "he was unhappy with his job and intended to leave the company . . ." Aff. at ¶ 4. Finally, while the amended complaint alleged that, after receiving the memo, Sorema's CEO gave Mr. Swierkiewicz two options -- quit without a severance package or be fired -- and that he was fired because he refused to quit, *id.* at ¶¶ 33-35, defense counsel's affidavit asserted he was fired because he "went to his office and cleared out all of his personal belongings [and then] refused to resign because Sorema did not grant him the severance he demanded." Aff. at ¶¶ 4-5. None of defense counsel's hearsay assertions can be squared with the allegations of the amended complaint nor can they be reasonably inferred from those allegations.

[2]In its ruling, the district court stated that it did not rely on the uncorroborated hearsay allegations contained in the affidavit of defense counsel. App. at 5a. Sorema, nonetheless, insisted that the full affidavit be included in the Joint Appendix filed in the Second Circuit. It then proceeded to rely on the affidavit's hearsay allegations in its brief in support of affirmance.

case under the rubric of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it held that Mr. Swierkiewicz had adequately pled membership in a protected class, was qualified to perform his job and (it assumed **arguendo**) had suffered an adverse employment action. App. at 6a. Nonetheless, despite five paragraphs in the amended complaint explicitly averring that Mr. Swierkiewicz was fired by Sorema on account of his national origin and age (*id.* at ¶¶ 37, 43, 45, 47 and 49), the district court concluded he had "not adequately alleged a *prima facie* case . . . [to] support an inference of discrimination." App. at 9a. Having dismissed Mr. Swierkiewicz's Title VII and ADEA claims on that basis, the district court then dismissed his pendent State and City law claims because "no additional facts" had been pled that would "cure the deficiencies in the federal claim[s]." *Id.*

Mr. Swierkiewicz appealed the dismissal of his action to the Second Circuit. Citing Rule 8(a)(2) of the Federal Rules of Civil Procedure, caselaw from this Court and from five circuit courts of appeals, he contended that, at the pleadings stage, his amended complaint should have been analyzed solely to determine if he had adequately put Sorema on notice of his discrimination claims -- and not whether he could make out at trial a *prima facie* case of discrimination under *McDonnell Douglas v. Green*. Notwithstanding his argument, the Second Circuit affirmed the district court. It too analyzed the amended complaint under *McDonnell Douglas v. Green* and, having done so, it dismissed Mr. Swierkiewicz's allegations as "conclusory" and "insufficient as a matter of law to raise an inference of discrimination." App. at 3a and 4a.



## B. Statement of Facts

The facts as drawn from the nine page amended complaint are as follows: Sorema is a French owned and controlled reinsurance company. Mr. Swierkiewicz, who is of Hungarian descent, was hired by Sorema in April 1989 as a Senior Vice President and Chief Underwriting Officer ("CUO"). He was 43 years old at the time. In February 1995, Francois Chavel, a French national and Sorema's Chief Executive Officer, demoted Mr. Swierkiewicz and transferred the bulk of his CUO duties to another French national, Nicholas Papadopoulo. Mr. Papadopoulo was 32 years old at the time -- 16 years younger and far less qualified for the job than Mr. Swierkiewicz. A year later, Mr. Chavel formally promoted Mr. Papadopoulo to the CUO position. Mr. Swierkiewicz's demotion and subsequent assignment to a marketing and services position had nothing at all to do with his performance. To the contrary, Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin and his age.[3]

Over the course of the next two years, Mr. Chavel continued to discriminate against Mr. Swierkiewicz on account of his national origin and age. He did so by isolating him, excluding him from business decisions and meetings, and denying him any opportunity for career growth. On the other hand, Mr. Chavel hired and promoted other French nationals and substantially younger employees

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[3]At the time of the demotion (which the Second Circuit erroneously characterized as a "shift [ ] . . . in job responsibilities", App. at 2a, a characterization nowhere to be found in the amended complaint, but which was likely drawn from the hearsay allegations in defense counsel's affidavit, *id.* at ¶ 3), Mr. Chavel stated he took the action in order to "energize" the underwriting department -- a clear indication that he considered Mr. Swierkiewicz too old for the CUO job. Amended Complaint at ¶ 23.

to perform jobs for which Mr. Swierkiewicz was more experienced and qualified to perform.

Mr. Swierkiewicz tried to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subject, but his efforts were unavailing. Finally, on April 14, 1997, after two years of ongoing discrimination, Mr. Swierkiewicz sent Mr. Chavel a memo outlining his grievances and requesting a severance package from Sorema. Mr. Chavel did not respond to the memo. Fifteen days later, on April 29, 1997, Mr. Chavel and Sorema's General Counsel met with Mr. Swierkiewicz and gave him an ultimatum: either resign without a severance package or be fired. Mr. Swierkiewicz refused to resign; whereupon, Mr. Chavel fired him effective that very day. There was no valid basis for the termination; it was, rather, motivated by Mr. Swierkiewicz's national origin and age (he was 50 at the time). Moreover, unlike other Sorema executives who were fired for cause and who nonetheless received generous severance packages from the company, Mr. Swierkiewicz, who was not fired for cause (his performance had always been above reproach), was denied severance pay and benefits by Sorema. This too was motivated by his national origin and age.



## REASON FOR GRANTING THE WRIT

### I. The Second Circuit's Decision Conflicts with Binding Precedent of This Court

The Second Circuit misconceived both its role and the applicable standard of review in affirming the dismissal of Mr. Swierkiewicz's amended complaint. Its role was "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

To answer that question, the Second Circuit (and the District Court before it) was required to determine whether Mr. Swierkiewicz's amended complaint stated "a claim upon which relief can be granted." Rule 12(b)(6), F.R.Civ.P. 'Ever since 1938, that has meant that a plaintiff has the duty -- but no more than this is required -- to put the defendant on notice of the nature of his action. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Fact pleading, a pre-1938 feature of code practice, has long since been abandoned in favor of post-complaint "discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47-48.

Employment discrimination and other civil rights claims are not exceptions to the notice pleading requirements of the Federal Rules. Indeed, *Conley* itself was a class action by African-American railroad clerks who claimed their union had breached its duty of fair representation and discriminated against them in violation of the Railway Labor Act, 45 U.S.C. § *151 et seq.* In

reversing the Rule 12(b)(6) dismissal of their complaint, this Court rejected the union's argument that the complaint was insufficiently fact-specific, stating:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

355 U.S. at 47 (footnote omitted).

Seventeen years later, in *Scheuer*, another civil rights action, the Court again cautioned lower federal courts against the too hasty dismissal of complaints based on their preliminary sense that recovery was "very remote." 416 U.S. at 236. Remoteness of recovery, the Court said, "is not the test." *Id.* Rather, "the complaint should be construed favorably to the pleader," *id.*, and allowed to proceed through discovery and then through summary judgment or trial. *Id.* at 250. Dismissal for failure to state a claim should only occur when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Id.* at 236, **quoting** *Conley*, 355 U.S. at 45-46.

Despite the holdings in *Conley* and *Scheuer*, a number of lower federal courts continued to hold civil rights plaintiffs to a higher pleading standard than otherwise required by Rule 8(a)(2). In 1993, the Court held that any such heightened pleading requirement was improper. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). "We think that it



> is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

Here, instead of deferring to the principle of notice pleading, the Second Circuit chastised Mr. Swierkiewicz for his "conclusory" allegations, App. at 3a, which, it held, were insufficient to "raise an inference of [national origin and age] discrimination." *Id.* at 3a-4a. The District Court also rebuked Mr. Swierkiewicz for the same alleged defects. *Id.* at 7a (dismissing the amended complaint for alleging "in a conclusory fashion that he was terminated as a result of his age and national origin."). These rulings were clearly improper. Five times in his amended complaint, Mr. Swierkiewicz pled that he was fired by Sorema on account of his national origin and his age. *Id.* at ¶ ¶ 37, 43, 45, 47 and 49. Under the notice pleading practice of the Federal Rules, that was sufficient to take his case past the pleadings stage and on to either summary judgment or trial. *Accord Scheuer v. Rhodes*, 416 U.S. at 250.[4]

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[4]Even if more were required by the Federal Rules than mere notice pleading, there clearly were sufficient facts pled in the amended complaint to satisfy the Second Circuit's heightened pleading requirement. These included: averments that Mr. Chavel demoted Mr. Swierkiewicz in 1995 in favor of a substantially younger and less qualified French national; two years of continuous discrimination against Mr. Swierkiewicz following his demotion; the preferences shown by Sorema for substantially younger French nationals; the sudden and unjustified firing of Mr. Swierkiewicz after he protested the unsatisfactory working conditions to which he had been subject; and the favorable severance packages that Sorema provided to other executives who, unlike Mr. Swierkiewicz, were fired by Sorema for cause. Put in this context, and reading the amended complaint in the light most favorable to Mr. Swierkiewicz, the Second Circuit clearly erred in affirming the dismissal of his lawsuit.

## II. The Second Circuit's Decision Conflicts With Precedent From Five Other Courts of Appeals

Among the circuit courts, only the Second Circuit has held that an employment discrimination plaintiff must plead the elements of a *McDonnell Douglas prima facie* case to withstand a defense motion to dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The five other courts of appeals that have considered the subject -- the District of Columbia, the Third, Seventh, Eighth and Ninth Circuits -- have all held that the *McDonnell Douglas* regimen is an evidentiary standard to be used at the summary judgment or trial stage of a discrimination case -- not one to be used at the pleadings stage to assess whether a discrimination complaint passes muster under the practice of notice pleading established by Rule 8(a)(2) of the Federal Rules of Civil Procedure. *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) ("Sparrow did not have to make out a *prima facie* case of discrimination in his complaint"); *Weston v. Commonwealth of Pennsylvania*, 2001 U.S.App. LEXIS 10514 at *22 (3d Cir. 2001) (eschewing any requirement of fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint need not set out the elements of a *prima facie* case: "I was turned down for a job because of my race is all a complaint has to say")(internal quotations omitted); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993)("the *prima facie* case . . . analysis is an evidentiary standard -- it defines the question of *proof* plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a



claim")(emphasis in original); and *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) ("A plaintiff need not make a *prima facie* showing to survive a motion to dismiss provided he otherwise sets forth a short and plain statement of his claim showing he is entitled to relief.").[5]

What separates the Second Circuit from these five Circuits is a fundamental difference of opinion between notice and fact pleading. But that divide was crossed in 1938 when the Federal Rules of Civil Procedure were adopted. Since then, save for the Second Circuit, the rule has been that notice pleading is all that is required in a complaint. The rest is left for discovery, summary judgment or trial. "Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of a party's proof leads to windy complaints and defeats the function of Rule 8." *Bennett v. Schmidt*, 153 F.3d at 519 (emphasis in original). The Second Circuit's contrary view, requiring a discrimination complaint to include the elements of a *McDonnell Douglas prima facie* case, constitutes an inter-circuit conflict that warrants review and resolution by this Court.[6]

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[5]The Court's decision last term in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) confirms, albeit implicitly, that *McDonnell Douglas* was intended as a means (though not the only means) for assessing whether a plaintiff has enough evidence to take his case to a verdict at trial -- not whether he has pled enough to withstand his employer's Rule 12(b)(6) motion to dismiss.

[6]Ironically, more than fifty years ago the Second Circuit held that complaints should not be dismissed for being insufficiently fact-specific. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). There, it stated:

> Under the new rules of civil procedure there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be "a

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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short and plain statement of the claim showing that the pleader is entitled to relief."

*Id.* at 775. *Dioguardi*, it should be pointed out, was cited with approval by this Court in *Conley*, 355 U.S. at 46 n.5. However, beginning in the 1970's, the Second Circuit began demanding more than mere notice pleading from employment discrimination plaintiffs, opting instead for the kind of fact-pleading that characterized pre-1938 code practice. *See, e.g., Martin v. New York State Dept. of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978) (motion to dismiss granted because plaintiff "has alleged only that he was denied the perquisites of his position because of his race.")(emphasis added).



(any footnotes trail end of each document)
No. 00-9010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AKOS SWIERKIEWICZ,
Plaintiff-Appellant,

v.

SOREMA, N.A.,
Defendant-Appellee.

March 12, 2001, Decided

**COUNSEL:**
APPEARING FOR APPELLANT: LAUREN REITER BRODY, Esq., Rosenman & Colin, LLP, New York, NY.

APPEARING FOR APPELLEE: HAROLD I. GOODMAN, Esq., Raynes, McCarty, Binder, Ross & Mundy, Philadelphia, PA.

**JUDGES:**
PRESENT: Hon. John M. Walker, Jr., Chief Judge, Hon. James L. Oakes, Hon. Guido Calabresi, Circuit Judges.

**OPINION:**

**SUMMARY ORDER**

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the

judgment of said district court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Akos Swierkiewicz appeals from an August 1, 2000 judgment of the United States District Court for the Southern District of New York (Preska, J.) granting Sorema's motion to dismiss appellant's claims of discrimination based on national origin, pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000*(e); and age discrimination, pursuant to the Age Discrimination in Employment Act of 1967, *29 U.S.C. § 626*(c)(1). On appeal, Swierkiewicz argues that the district erred in dismissing the complaint because the district court improperly applied a heightened pleading requirement and, in the alternative, if he needed to comply with a heightened pleading requirement, he has done so and that dismissal was therefore unwarranted.

Swierkiewicz, of Hungarian descent, has been a United States citizen since 1970. Defendant-appellee Sorema is a reinsurance company headquartered in New York and principally owned and controlled by a French parent company. In April 1989, Swierkiewicz, at the age of 43, began working for Sorema as a Senior Vice President and Chief Underwriting Officer. In February 1995, Francois Chavel, Sorema's President and Chief Executive Officer, shifted Swierkiewicz's job responsibilities to marketing and services and transferred the bulk of Swierkiewicz's underwriting responsibilities to Nicolas Papadopoulo, a 32-year-old French national. At the time of this transition, Chavel stated that he wanted to "energize" the underwriting department. Swierkiewicz states that over the next two years he was "isolated by Mr. Chaval excluded from business decisions and meetings and denied the opportunity to reach his true potential at Sorema."

In April 1997, Swierkiewicz wrote a memorandum to Mr. Chaval outlining these grievances and concluding that he had no choice but to leave the company providing that a suitable



severance package was provided. Two weeks later, Sorema's general counsel informed Swierkiewicz that Swierkiewicz could either resign without a severance package or be terminated. Later that same day, upon Swierkiewicz's refusal to resign, Sorema fired him.

We review the district court's grant of motion to dismiss de novo. See *Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000)*.

"It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." *Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978);* see also, *Tarshis, 211 F.3d at 35.*

To plead discrimination based on national origin, a plaintiff must allege (1) membership, (2) qualification for the job in question, (3) an adverse employment action and (4) circumstances that give support to an inference of discrimination. See *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. With respect to national origin, the only circumstances Swierkiewicz pled are that he is Hungarian, others at Sorema are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the district court that these allegations are insufficient as a matter of law to raise an inference of discrimination.

To plead discrimination based on age, a plaintiff must allege that (1) he is in the protected age group, (2) he is qualified for the job, (3) he was discharged and (4) the discharge occurred under the circumstances giving rise to an inference of age discrimination. See *Hollander v. American Cyanamid Co., 172 F.3d 192, 198* (2d Cir.), cert. denied, *528 U.S. 965, 145 L. Ed. 2d 311, 120 S. Ct. 399 (1999)*. The only circumstance that Swierkiewicz alleges gives rise to an inference of age discrimination is Chavel's comment in 1995

that Chavel wanted to "energize" the underwriting department. We agree with the district court that this allegation is insufficient as a matter of law to raise an inference of discrimination.

We have considered Swierkiewicz's remaining arguments and consider them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the district court.



No. 99-Civil-12272

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

v.

SOREMA, N.A.,
Defendant

July 6, 2000 Judge Preska

TRANSCRIPT.

(In Open court)

THE COURT: Won't you be seated, counsel. We're here today on defendant's motion to dismiss the amended complaint.

First, I will state for the record that I do not rely on any of the material in the Brody affidavits beyond the documents referred to in the complaint, that is, the EEOC charge and the memorandum dated April 14, 1997. I disregard the other material as not cognizable on a motion to dismiss.

Counsel agree that the only allegedly adverse employment action at issue is the April, 1997 discharge of plaintiff by defendant. We spent a great deal of time discussing the legal significance of the material in the complaint and the other documents relating to earlier time periods, and, specifically, we've discussed the requirements of United Airlines v. Evans, 97 Supreme Court 1885 at 1889 (1977), to the effect that allegations relating to earlier time

periods "may constitute relevant background evidence in a proceeding... but separately considered... [are] merely unfortunate event[s] in history, which [have] no present legal consequences."

I need not decide today to what extent these earlier activities are relevant, as plaintiff suggests, for "context," that is, to show circumstances from which an inference of discrimination can be drawn, because on the record before me they are insufficient in any event.

Plaintiff has, in fact, adequately pled membership in a protected class, qualification for the job in question, and I assume arguendo, without deciding, that he has pled an adverse employment action. What he has not adequately pled are circumstances that support an inference of discrimination.

First, with respect to national origin discrimination, the factual context which counsel points me to is contained primarily in the April 14, 1997 memorandum where plaintiff tells his superior that he is unhappy at the company. He discusses his "gradual demotion" and his becoming "increasingly frustrated, burnt out, and demoralized by the lack of cooperation, unreasonable demands, and constant interference by [Nicholas Papadopoulo]."

Plaintiff goes on to state that he "found [him]self systematically excluded, cut off from any further participation despite [Mr. Papadopoulo's] lack of understanding of the U.S. marketing style."

Plaintiff also states that: "It is evident that I have not only reached the 'glass ceiling' at Sorema with no prospect for further advancement, but also encountering a hostile, demoralizing, and humiliating atmosphere and constant chaos, which is counterproductive to work efforts. In view of the above, after long and thoughtful considerations, I concluded that I have no other choice but to leave the company provided that a suitable and acceptable arrangement can be reached."

Plaintiff goes on to state what he considers such



suitable and acceptable arrangement, including a one-year paid leave of absence and other requirements. He concludes that memorandum by saying, "Because of the untenable work environment, I wish to leave as soon as the above outlined conditions are agreed to."

At oral argument, plaintiff's counsel concedes that there was nothing in the memorandum from which an inference of age or national origin discrimination can be made. Counsel argues that the use of the words "glass ceiling" might provide such an inference. I reject that suggestion. There is nothing in the memorandum from which age or national origin discrimination can be inferred, and the use of the popularized term "glass ceiling" is not sufficient.

Indeed, granting all inferences to plaintiff, the memorandum can be characterized as nothing other than plaintiff's dissatisfaction with his lot within the company for various nondiscriminatory reasons.

As plaintiff stated in his EEOC complaint, which I consider such since it was referred to in the amended complaint, following receipt of the April 14, 1997 memorandum, plaintiff's superiors gave him the option of either resigning or being terminated. He opted to be terminated. Plaintiff also states in the EEOC charge that his superiors at the company told him that he had committed a hostile act against the company by clearing out his personal items from the office. He continues, "This all stemmed from my untenable relationship with Nicholas Papadopoulo, (a natural born French citizen of Greek heritage/age 33), executive vice President and chief underwriting officer.

Finally, both in his EEOC charge and in the amended complaint, plaintiff alleges in a conclusory fashion that he was terminated as a result of his age and national origin. Plaintiff alleges in his complaint at, among other places, paragraphs 21, 24, 26 that other, in his view, less qualified individuals were promoted beyond him and alleges at paragraph 38 that individuals fired with cause were provided severance packages, and plaintiff was denied a severance

package. All of these are insufficient to raise an inference that the circumstances under which plaintiff was terminated were discriminatory.

With respect to national origin, the only mention of national origin is that plaintiff was of Hungarian descent, that other folks that were promoted were of different national origins, especially Mr. Papadopoulo, who is alleged to he a French citizen, and that there are no other Hungarians at any level within the company. These conclusory allegations are insufficient as a matter of law to raise an inference of discrimination.

With respect to age, plaintiff makes reference to a remark attributed to Mr. Papadopoulo—

MR. BRODY: Your Honor, excuse me. Mr. Chavel.

THE COURT:I'm sorry, Chavel. Thank you.

In February of 1995 or 1996, to the extent that Mr. Chavel wnted to "energize" the underwriting department. This remark was allegedly made at the time Mr. Papadopoulo, a younger man, is alleged to have assumed plaintiff's duties (amended complaint, paragraph 23). This remark is insufficient to create an inference of discrimination.

First, the remark is too vague to be considered age related, even giving all inferences in plaintiff's favor. Secondly, even if the remark were considered to be an age-related remark, it is far too remote in time and unrelated to the job action at issue. As I mentioned, the remark is alleged to have taken place in February of 1995 or February of 1996. Plaintiff's termination was in 1997, April of 1997. Accordingly, the remark was far too remote in time.

Secondly, the remark cannot be said to have been directed at plaintiff or his work activities in the manner discussed by Judge Sotomayor in Cartegna v. Ogden Services, Corp., 995 F. Supp. 459, 463 (S.D.N.Y. 1998). Accordingly, for both those reasons, the energized remark is insufficient to raise an inference of age discrimination.

With respect to the allegations that other folks were



promoted who were less qualified, those allegations boil down to exactly that. Plaintiff complains that other folks who, in his view, were less qualified were promoted ahead of him, in his place, assumed his duties and the like. Such allegations are insufficient to raise an inference of discriminatory circumstances.

Finally, with respect to the severance package allegations contained at paragraph 38 of the amended complaint, the sum and substance of those allegations is that other individuals who were fired for cause received severance and plaintiff did not. In both of these circumstances, that is, the promotions and the severance, there are no facts alleged which connect those actions to age or national origin discrimination with respect to plaintiff.

Indeed, during the course of oral argument, no such facts have been discussed in response to questions regarding the severance allegations. Counsel concedes that there were no facts that add to that allegation. Accordingly, even giving all inferences to plaintiff, as I must, on a motion to dismiss, I find that plaintiff has not adequately alleged a prima facie case, in that he has not adequately alleged circumstances that support an inference of discrimination.

Accordingly, the amended complaint is dismissed. The federal claims are insufficient, and I decline to exercise supplemental jurisdiction over the state claims. Because no additional facts have been discussed, which would cure the deficiencies in the federal claim, the dismissal is with prejudice.

Counsel, have I forgotten anything?

MS. BRODY: No, your Honor.

THE COURT: Thank you. Good morning, counsel.

MR. GOODMAN: Thank you, your Honor.

MS. BRODY: Thank you, your Honor.

No. 99-Civil-12272

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

v.

SOREMA, N.A.,
Defendant

JUDGMENT

Filed 7/31/00

Whereas the parties having appeared before this Court and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court, on July 26, 2000, having rendered its Memo Endorsed Order dismissing the amended complaint with prejudice, it is,
ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memo Endorsed Order dated July 26, 2000, the amended complaint is dismissed with prejudice.
DATED: 7/31/2000



August 2, 2000

*Via Facsimile Only*
Honorable Loretta A. Preska
United States District Judge
United States Courthouse
500 Pearl Street, Room 1320
New York, NY 10007

Re: **Swierkiewicz v. Sorema N.A.**
**Docket No. 99-CV-12272 (LAP)**

Dear Judge Preska:

I write to confirm my understanding that the Court would have dismissed with prejudice Mr. Swierkiewicz's amended complaint had he sought leave to amend paragraph 38 to state that the reason defendant Sorema treated him differently than the referenced employees was on account of his age and national origin. My understanding is drawn from the Court's bench ruling at the argument held on July 6, 2000.

If my understanding is correct, I do not wish to burden the Court with a futile motion for reconsideration pursuant to Rule 59, and wish only to ensure that the record is clear for appeal.

If I am mistaken in my assumption, I respectfully request that the Court consider this letter as a motion pursuant to Rule 59 and grant plaintiff additional time to file a memorandum of law in support of the motion.

Thank you very much.

Respectfully submitted,
Harold I. Goodman

HIG/vlf

Because counsel was unable to state any additional facts to be included in an amended complaint, any amendment would be futile.

So ordered,

Loretta A. Preska
USDJ

Dated: 8/11/2000